Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

a radical change." The Iowa court reasoned, "repeals by implication are not favored. It is not certain that the Legislature meant to change the settled rule, therefore we will not change it." And the result is the opposing rulings. The States that have passed upon this question are about equally divided, even as New York is divided within itself. Of course many of the decisions are sound because of the peculiar wording of the statutes. Yet the result is uncertainty. The note may be void or voidable in its entirety, or only as to usurious interest. The Federal court, in *Rodecker* v. *Littauer,* 59 Fed. 857, says, "if the statute makes the note entirely void for usury, there can be no bona fide holder of it." The Minnesota statute, § 2214, Gen. St. 1894, considered in *Robinson* v. *Smith,* 62 Minn. 62, 64 N. W. 90, declares all usurious notes void, but it contains a proviso that "nothing herein shall be construed to prevent the purchase of negotiable paper, usurious or otherwise, for a valuable consideration by an innocent purchaser, free from all equities," etc. In case the original holder sells a usurious note to a bona fide purchaser, the statute allows the maker to recover from the original holder any sums paid by the maker to the purchaser. This statute clearly settles the matter in Minnesota, and allows the holder in due course to take the notes freed from the vice of usury. In North Carolina and Kentucky promissory notes embracing usurious interest are void in the hands of a bona fide purchaser. *Faison* v. *Grandy,* 128 N. C. 438, 38 S. E. 897; *Stokley* v. *Buckler,* 22 Ky. L. Rep. 1740, 61 S. W. 460. In Texas the usurious note is void as to the interest only, and judgment may be rendered for the balance of the principal unpaid. *Miles* v. *Kelley,* 16 Tex. Civ. App. 147, 40 S. W. 599. Where the note is valid in its inception, but is later transferred usuriously, the general rule is that the defense is not available to the maker; it is so decided in Alabama, Maine, Iowa, Massachusetts, and Tennessee, but the contrary result is reached in Connecticut and New Jersey. In *Bradshaw* v. *Van Valkenberg,* 97 Tenn. 316, 37 S. W. 88, the change of law in that State is discussed. Prior to the Act of 1819 all usurious contracts were absolutely void, and stood upon the same footing as those made for a gambling consideration. Usury could then be pleaded against an innocent holder for value, without notice. But the Act of 1819, c. 32, made usurious contracts void or voidable only for the usurious interest. So at present the Tennessee courts hold that if the purchaser knew nothing of the usury between the original parties, he will not be affected thereby. Most of the decisions upon the question can be sustained, according to the construction to be placed upon the Negotiable Instruments Law in its relation to the previous law. But meanwhile business-men in many States will continue to feel uncertain. W. F. B.

CONSTITUTIONAL LAW—FRANCHISE TAX ON INTERSTATE RAILWAY CORPORATION.—The State of Arkansas passed an act (Acts of Arkansas, 1911, No. 112, p. 67) levying a franchise tax on corporations in the State; foreign corporations, for the privilege of exercising their franchise in the State, were taxed one-twentieth of one per cent per year "on the proportion of the outstanding capital stock of the corporation represented by property owned and

used in business transacted in this State," with various penalties for failure to pay, among which was forfeiture of the right to do business in the State. Domestic corporations were taxed at the same rate upon "that part of their subscribed or issued or outstanding capital employed in Arkansas." By another act passed about the same time (Acts of Arkansas, 1911, p. 233,) the franchise, other than the right to be a corporation, of enumerated classes of corporations, was declared property for the purposes of taxation and the value of the same was to be included in the total general property tax assessment. The defendant, a Missouri railroad corporation doing both inter-state and intra-state business, opposed the constitutionality of the tax levied by the first section on the ground that it was double taxation and was also repugnant to the Commerce Clause of the United States Constitution and the "due process" and "equal protection" clauses of the Fourteenth Amendment. The United States Supreme Court, in the case of *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 35 Sup. Ct. 99, held the taxation constitutional, on reasoning which may be summarized as follows. Looking at the substance of the act, tested by its operation and effect as applied and construed by the State courts, the tax is constitutional. It does not violate the Commerce Clause because it levies no tax except on property within the State. Double taxation is not a denial of equal protection in favor of other classes of taxpayers in this case, not being based on arbitrary distinctions. In the absence of a decision of the State court upon the forfeiture clause in the act in question the presumption arises, in view of the trend of the decisions of the State court, that they will construe it either as applying only to a forfeiture of right to do intra-state business or consider it as void and separable. Where two possible constructions arise that one which makes for constitutionality must be accepted.

It is very well settled that a state may not tax interstate commerce but may tax property within its territory engaged in interstate commerce and a franchise which is part of the property, even though that franchise is the business of interstate commerce, unless derived from the United States. *Atlantic &c. Tel. Co.* v. *Philadelphia,* 190 U. S. 160; *Postal Tel. Cable Co.* v. *Adams,* 155 U. S. 688. Not to be a tax on interstate commerce the statute must, first—adopt some form of valuing only the property within the state else it will come within the prohibition laid down in *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; and *Postal Tel. Cable Co.* v. *Adams,* supra; second, the tax must be levied equally on domestic and foreign corporations. *Southern Railway Co.* v. *Greene,* 216 U. S. 460. Does the statute in question fulfill this last requirement? Domestic corporations are taxed upon "that part of their subscribed or issued and outstanding *capital* employed in Arkansas"; foreign corporations are taxed upon "the proportion of the outstanding *capital stock* * * * represented by property owned and used in business transacted in this state." There is a well defined difference between "capital" and "capital stock" of a corporation. The capital stock is the amount subscribed and paid in or secured to be paid in by the shareholders, upon which the operations of the corporation are conducted. Capital, on the other hand, does not mean the capital stock, but the actual property or estate of

the corporation. It is the paid up capital stock plus gains or minus losses as the case may be. 2 MARSHALL & CLARK, CORPORATIONS. 1140. From this it is very apparent that a corporation's capital stock may be a very large amount and the capital very small, and vice versa. Applying the Arkansas statute to a concrete case the result is as follows: two corporations, one foreign and one domestic, have fully paid capital stock of $100,000 each. The actual capital of the domestic corporation is $50,000; the tax thereon is $25 figured on the capital as provided by the act. The foreign corporation has a capital of $80,000, $50,000 of it being used in the state, this being the only part which may be taxed; applying the law here we get a taxing basis of $62,500 and a tax of $31.25, being $6.25 more on the same amount of property. This seems to be the logical result of the application of the tax in question if applied according to the technical meaning of the terms used. But admittedly the terms "capital" and "capital stock" are used, at times, to express the same thing, though erroneously. Perhaps this was actually the legislative intent. In such case, and if in actual operation the tax is worked out on this basis, there would be no discrimination; otherwise it is hard to escape the conclusion that the tax is unconstitutional. The point of discrimination was not contended upon the trial, and the court is careful to mention this fact in the decision. The court says the tax is not distinguishable from that which was upheld in *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530. In this case there was no such question of discrimination raised and the tax is clearly on "capital stock" valuations.

Another serious point is raised by the presence of the forfeiture clause of § 20 of the Act, providing that upon failure to pay "said corporation shall forfeit its right to do business in the state" in addition to the other penalties. If this means the right to engage in inter-state, as well as intra-state commerce it amounts to a regulation of interstate commerce and hence the act would be void, unless § 20 is considered as separable. *Western Union Tel. Co.* v. *Massachusetts,* supra; *Allen* v. *Pullman Co.,* 191 U. S. 171. Construed in the ordinary meaning of words this would seem to be the result. But here, also, it is possible that the legislature intended the forfeiture to affect only the right to engage in intra-state commerce. There has never been a construction of this clause by the State court, and as two constructions are plausible, the Supreme Court considered it proper to wait till the point was decided in the State court, upon authority of *Adams* v. *Russell,* 229 U. S. 353, and *United States* v. *Coombs,* 12 Pet. 72. From an investigation into the issues of the case it would seem that the case would call for a decision on this point, a proper decision of the case depending upon it. This was an action brought to recover the tax. If § 20 is not separable, then the whole act is unconstitutional and as a result the efforts to collect the tax would be futile. In view of this it seems that the court should have decided the point without waiting for the State court. Of course they strongly intimated what their decision would be, but should the Supreme Court of Arkansas thing otherwise—they having the right to construe the legislative intent—further litigation would thereby be encouraged and the matter would be much confused.

M. K. B.